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Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 699.

JOHN A. JOHNSON, Petitioner,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

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Counsel for Petitioner.

Of Counsel:
SUTHERLAND, TUTTLE & BRENNAN,
Atlanta, Georgia.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

There was no reported opinion of the District Court, but that Court referred to its earlier opinion in a case involving the same petitioner reported at 13 F. Supp. 252. The opinion of the Circuit Court of Appeals is reported at 92 F. (2d) 748, and will be found at page 66 of the Record.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 24, 1937. The petition for a writ of certiorari was filed January 13, 1938, and was granted February 14, 1938. Jurisdiction of this Court is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED.

Whether petitioner's trial and conviction of the charge of uttering and possessing counterfeit money, where he was unable to secure counsel to represent him, was ignorant of his right to have counsel, and was put on trial the day he was first advised of his indictment without counsel to represent him, was void as being in violation of the Fifth and Sixth Amendments to the Constitution, and whether petitioner, while serving such sentence, is entitled to gain his freedom by writ of habeas corpus.

STATEMENT.

The petitioner filed his petition for the writ of habeas corpus, complaining of his detention in the Federal Penitentiary in Atlanta, Georgia, alleging that he was being held in violation of his constitutional rights. He was arrested in Charleston, South Carolina, on November 21, 1934, together with one Monroe C. Bridwell, charged with feloniously uttering and passing four (4) counterfeit twenty-dollar Federal Reserve notes, and with knowingly and feloniously possessing twenty-one (21) counterfeit Federal Reserve notes, with intent to defraud. At the time

of their arrest, petitioner and Bridwell were in the United States Marine Corps, on leave. A hearing was had before the United States Commissioner, at which the men were represented by counsel of their own choosing. They were bound over to await the action of the United States grand jury and, being unable to give bail, were confined in a local jail. An indictment was rendered against them at the next term of court on January 21, 1935. They knew nothing of this indictment until they were brought into court on January 23rd, at which time they pleaded not guilty, and were placed on trial (R. 41, 48). When brought into court, in their ignorance they thought they were going to appear before the grand jury and that they would then be released, but instead they were informed that they had been indicted and were placed on trial (R. 48).

The men were unable to provide counsel for themselves; the court did not appoint counsel for them; therefore, they were not represented by counsel at the trial. The petitioner, who was thus put in jeopardy of his liberty, had no schooling beyond the fifth grade, and was without any legal knowledge or skill. He was utterly without funds and knew no one in the vicinity of Charleston, where the trial took place. He neither examined witnesses nor testified on his own behalf, nor addressed the jury, although his co-defendant, Bridwell, attempted in a feeble way to speak in defense of himself and of the petitioner (R. 46, 48).

During the trial, according to a statement contained in the opinion of the Circuit Court of Appeals, Bridwell stated that he did not think that men *of such limited knowledge as he and petitioner were* would know counterfeit money when they saw it, and asked that a witness be called to establish whether the money was counterfeit. The District Attorney procured a witness, *who was a deputy sher-*

iff in charge of tax collections, and handled considerable money in performing his duties (R. 69). He testified that the money was counterfeit and that that fact was readily discernible.

In addition to the undisputed facts as hereinabove set out, both petitioner and Bridwell testified that they asked the District Attorney in open court whether they could have counsel appointed for them and he replied that counsel was not appointed in South Carolina except in capital cases. The men also testified that they asked the District Attorney in open court after the trial was under way if they could have witnesses, and that he replied it was then too late. The District Attorney disputed the evidence as to the request for counsel, and both the District Attorney and his assistant disputed the statement that petitioner requested an opportunity to get witnesses. The Assistant District Attorney did not dispute the testimony of Bridwell and Johnson that Bridwell requested the District Attorney for the assignment of counsel. The clerk before whose desk the preliminaries were taking place did not dispute the testimony of the men that they requested counsel. He said, "I don't recall the defendants requesting counsel to represent them in the case. I wouldn't say positively the Judge refused counsel to the defendants" (R. 21). The trial judge, the only other person present who would normally have known what transpired and whose testimony was sought by petitioners, upon the habeas corpus proceeding, was unavailable the day upon which his testimony was to be taken, and petitioner was, therefore, unable to ascertain what his personal recollection of the matter was, if any (R. 29, 35, 36).

A verdict of guilty against petitioner and Bridwell was rendered on the same day, and the men were both sentenced to be imprisoned for four years and six months.

For the following twenty-four hours, petitioner and Bridwell repeatedly asked jailers to get them in touch with a lawyer, all to no avail (R. 42, 44, 49). The second morning after the trial they were transported by automobile from Charleston to Atlanta, a day's trip, and upon arrival there they were placed in quarantine at the Federal Prison. No appeal was taken from this judgment, petitioner having testified upon the habeas corpus proceeding that he knew nothing as to his rights to have counsel at the trial and that he knew nothing as to his rights relating to the filing of a motion for a new trial or prosecuting an appeal.

The petitioner alleged that the judgment of conviction was an absolute nullity on the grounds that he was innocent of the charge, that he was denied compulsory process for obtaining witnesses in his favor, and the right to have the assistance of counsel for his defense, in violation of the Sixth Amendment to the Federal Constitution, and was therefore denied due process of law in violation of the Fifth Amendment to the Federal Constitution. The District Court for the Northern District of Georgia appointed counsel to represent petitioner on the trial of the habeas corpus case and evidence was taken on the hearing. The District Court reached the conclusion that petitioner and Bridwell, who filed a petition at the same time, had been deprived of constitutional rights as alleged, but that, as the trial court had jurisdiction, the judgment was not void, and the errors and irregularities could have been corrected only on appeal. *Bridwell v. Aderhold*, 13 F. Supp. 253. No appeal was taken from this judgment. However, in December, 1936, the application for release on habeas corpus was renewed on the same grounds. Petitioner appeared by counsel and additional evidence was taken and the District

Court again discharged the writ and referred to its opinion in the prior case (R. 56). It is from this decision of the District Court that the present appeal is taken. The decision of the District Court was affirmed by the Circuit Court of Appeals for the Fifth Circuit in its opinion of November 24, 1937. Bridwell has since been released on parole, and his appeal is not being prosecuted.

SPECIFICATION OF ERRORS.

Petitioner contends that the Circuit Court of Appeals erred:

1. In holding that in the trial of petitioner for a non-capital felony the trial court was not required to appoint counsel to represent him.

2. In holding that where the accused was tried for a non-capital felony without the assistance of counsel when he was of limited education and without legal skill or knowledge and without knowledge of his legal rights, and such trial resulted in his conviction, sentence and commitment to the United States Penitentiary for four and one-half (4½) years, petitioner was not entitled to be released upon his petition for writ of habeas corpus.

3. In holding that the judgment of the trial court discharging the writ sought by petitioner was right.

4. In not reversing the judgment of the trial court and releasing petitioner on his writ of habeas corpus.

SUMMARY OF ARGUMENT.

1. Upon the undisputed facts, the failure of the court to assign counsel for petitioner in the trial of his case deprived him of his constitutional rights under the Sixth Amendment.

2. The trial, conviction and sentence of petitioner under the circumstances here disclosed deprived petitioner of his liberty without due process of law in violation of the Fifth Amendment.

3. Petitioner's conviction in violation of the rights guaranteed by the Fifth and Sixth Amendments is a nullity and he is entitled to be released upon writ of habeas corpus.

4. Petitioner is entitled to have his testimony that counsel was requested accepted as true.

ARGUMENT.

The Record contains some inconsistencies and ambiguities which leave in doubt the truth about a number of the facts testified to upon the trial of the habeas corpus proceedings. While petitioner does not waive his contentions as to the truth of these facts, and the fourth division of this argument is devoted to the statement of his contentions in that regard, it is not deemed important in the discussion of the first three branches of the argument to determine whether petitioner's version or that of Respondent is to be believed. For the purpose of the arguments under the first three sections, it will be assumed that the facts are as conceded by the Respondent. Substantially, these facts are: That petitioner was put on trial the day he was first advised of an indictment against him on an offense the maximum penalty for which was thirty (30) years in the penitentiary and the payment of a $10,000.00 fine, after having been kept in jail following a commitment hearing two months previously; that he had no funds with which to hire a lawyer, although he tried to get one to represent him; that upon being apprised in open court of the indictment against him, he pleaded not guilty and an immediate trial was had; that this trial consumed several hours, during which a number of witnesses were called on behalf of the Government; that the prosecution was conducted by the District Attorney and his assistant, both of whom participated actively; that defendant took no part in the trial of the case by examining witnesses or making any statement on his own behalf, although one Bridwell, who was indicted with him, undertook to the best of his ability to conduct a defense for both men; that neither of them had been educated beyond the fourth or fifth grade in school, and neither of them had any legal training or knowledge; that the trial

thus conducted resulted in the conviction of petitioner and was followed by his sentence to four and one-half years in the Federal Penitentiary in Atlanta; that he was kept in the Charleston County jail until the second morning after the trial, at which time he was removed by automobile to the Federal Penitentiary in Atlanta; that petitioner filed no appeal within the time provided by law; and that petitioner knew nothing as to any rights which he had with respect to having counsel assigned for him or the right to appeal.

I.

UPON THE UNDISPUTED FACTS, THE FAILURE OF THE COURT TO ASSIGN COUNSEL FOR PETITIONER IN THE TRIAL OF HIS CASE DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT.

The Sixth Amendment to the Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Assuming, as we do for the purpose of this present argument, that petitioner made no request for counsel, then it is petitioner's contention that his failure to make such request did not deprive him of the right to have coun-

sel appointed. As is so aptly stated by the Government in its brief in opposition to the petition for certiorari,

> "Criminal defendants will often be ignorant of their rights and the Constitutional protection may at times be drained of content if the defendant must himself take the initiative." Brief for the United States in Opposition, p. 14.

But the Government concludes, in spite of the foregoing statement, that "the Sixth Amendment cannot be stretched to place imperative duty on the trial court either to assign counsel or to obtain an *express* waiver from every unrepresented defendant." (Italics supplied.)

Such a theory has been definitely repudiated by this court in the instance of a waiver of another right guaranteed by the Sixth Amendment, to-wit, the right to trial by jury. In the case of *Patton v. United States,* 281 U. S. 276, the defendant in open court, when represented by competent counsel, stipulated that a trial might proceed before a jury of eleven men, after one of the twelve had become ill, and such stipulation was renewed in open court after the trial judge had fully explained the rights of the parties and had stated that both defendant and the Government were entitled to a constitutional jury of twelve men. In spite of such a studied and unequivocal stipulation, it was a matter of serious concern in this Court whether a trial thus conducted became a nullity. In affirming the power of the defendant to waive a trial of a constitutional jury of twelve men in the *Patton* case, this court made the following significant statement:

> "Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has

> such a place in our traditions that, before any waiver can become effective the consent of government counsel and the sanction of the court must be had, *in addition to the express and intelligent consent of the defendant.* And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." *Patton v. U. S.*, supra, 312. (Italics supplied.)

If the waiver of the presence of a single juror is to be hedged about with such meticulous safeguards as indicated in the language above quoted, how much more important is it that the waiver of the right to counsel be recognized only with at least the same degree of caution. In the instance of a waiver of any of the other rights guaranteed by the Sixth Amendment, whether it be the right to a jury of twelve, a public trial, confrontation of witnesses, or compulsory process, the presumption may at least be indulged that his rights are known by the accused *if he has counsel present;* but in the instance of a waiver of the right to counsel itself, there is absolutely no safeguard surrounding the accused because, lacking counsel, he cannot even be presumed to know that he is entitled to be represented. Can there be any pretense that in Johnson's trial there was any "*express* and *intelligent* consent of the defendant"? In fact, the Government concedes that there was none, and bases its argument upon the proposition that "the Sixth Amendment cannot be stretched to place an imperative duty on the trial court * * * to obtain an express waiver." This argument is completely answered in the *Patton* case where this Court

says that the correlative right to trial by jury also granted by the Sixth Amendment must be adhered to unless in the case of *express* and intelligent waiver.

That the precise question here presented has not previously been before this Court for determination is convincing evidence of the well-nigh universal recognition by the lower Federal courts of the fundamental character of the right. The action of the trial court in putting Johnson in jeopardy without representation has, in effect, been condemned by every court and official who has had occasion to give consideration to it. The trial court in the habeas corpus proceeding held that the petitioner had been deprived of his constitutional right; the Circuit Court of Appeals in its opinion said, "Perhaps it would have been better if he (the trial judge) had done so (appointed counsel for petitioner) on his own motion"; the United States in its brief in opposition says, "* * * it may be a wholesome practice to require that every criminal defendant accused of felony must either be represented by or expressly refuse counsel * * *." The Department of Justice, doubtless based upon the facts of this case, has directed the United States attorneys to call to the attention of trial courts the wisdom of having counsel appointed or obtaining an express waiver from the accused (Department of Justice Circular #2946, dated March 4, 1937, set out in appendix to Government's brief in opposition).

Thus universally has the action of the trial court been criticized. Such criticism springs from a natural conception of the fundamental rights that are guaranteed to an accused under our system of justice.

Aside from the question of waiver, which has been discussed above, the Government apparently goes further and

takes the position that the Sixth Amendment does not operate directly upon the courts at all, but simply prohibits Congress from enacting a *statutory* denial of the right to counsel. (See Government's brief in opposition to the granting of certiorari, p. 15.) There is of course nothing in the language of the Sixth Amendment to suggest that its operation is so restricted. Furthermore, at pages 13 and 14 of the Government's brief in opposition, the Government concedes that if the petitioner requested counsel and was refused counsel, then there would be a violation of the Sixth Amendment; and this of course would be true whether or not Congress had enacted any statutory provisions with respect to the right to counsel. Thus it appears by the Government's own concession that the Sixth Amendment does not restrict the Congress alone, but on the contrary operates directly upon the courts regardless of any action or nonaction by Congress. Also, in the *Patton* case, supra, this Court has held that the rights guaranteed by the Sixth Amendment may not constitutionally be denied a defendant except upon his express waiver, and in so holding, this Court has clearly indicated that the Sixth Amendment operates directly upon the trial courts, and is not limited in its operation to what the Congress may or may not do by statute.

The suggestion that the Sixth Amendment, in guaranteeing the right of counsel, is limited in its operation to capital cases, is entirely without foundation since the Amendment specifically provides that it shall apply in "all criminal prosecution."

Moreover, the suggestion that the provision in question was intended to do no more than to prevent the adoption of the old English common law rule, which denied the privilege of representation in treason and other capital

cases, is not tenable because as is clearly shown in the opinion in *Powell v. Alabama*, 287 U. S. 45, at p. 64, this harsh and inhuman rule of the English common law had already been repudiated in twelve of the thirteen American colonies.

Decisions of the courts of last resort of the states mentioned in the Government's brief in opposition are not at all uniform in their holdings. It has been impossible to make an exhaustive survey of all of the state decisions reflecting the courts' views on this question, but a number of cases which are deemed to be pertinent and which tend to support petitioner's views under various state constitutions are cited in the note below.* While respectful consideration should be given to the state decisions, it is submitted that the principles contended for by petitioner here have been too well recognized by this Court to be weakened by any contrary state court opinion.

It seems clear that upon the authority of the *Patton* case the Sixth Amendment placed upon the trial court a duty to insure to petitioner representation of counsel unless he *expressly* waived the privilege. It is conceded that there was no such express waiver.

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* Batchelor v. State, 189 Ind. 69; Commonwealth v. Richards, 111 Pa. Super. 124; Commonwealth v. Valerio, 118 Pa. Super. 34; Commonwealth v. Cohen, 123 Pa. Super. 5; Williams v. State, 163 Ark. 623; Cass v. Commonwealth, 236 Ky. 462; Stephenson v. State, 4 Ohio App. 128; Cassidy v. State, 201 Ind. 311; Bielich v. State, 291 Ill. 471; Cook v. State, 48 Ga. App. 224; Reliford v. State, 140 Ga. 777.

II.

THE TRIAL, CONVICTION AND SENTENCE OF PETITIONER UNDER THE CIRCUMSTANCES HERE DISCLOSED DEPRIVED PETITIONER OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT.

It of course makes little difference to the petitioner here whether it be found that his trial, conviction and sentence were void because of a denial of his rights under the Sixth Amendment, or because of a denial of due process as guarteed by the Fifth Amendment to the Constitution. Petitioner contends that on either count he is entitled to his freedom.

The Fifth Amendment provides that,

> "No person shall be deprived of life, liberty or property without due process of law."

Whatever might have been thought the law prior to *Powell v. Alabama*, 287 U. S. 45, it was by that decision established that in a proper case "the aid of counsel is essential to due process." 287 U. S. at p. 68. The issue of whether the petitioner in the instant case was deprived of his constitutional rights is therefore presented under both the Fifth and Sixth Amendments, and, upon the facts, it must be held, it is submitted, that he was deprived of those rights.

In addition to the *Powell* case, this Court has recently decided two other cases affecting the rights of defendants in state criminal cases. Both of them, it may be stated, have given new meaning to the requirements of due process. In *Brown v. Mississippi*, 297 U. S. 278, the accused

had been convicted solely upon confessions obtained by third-degree methods and his constitutional right against self-incrimination was thus denied. The accused was represented by counsel, and it was contended that failure by counsel to move for the exclusion of the confessions operated as a waiver of the constitutional right against self-incrimination. The Supreme Court held that the denial of this right was not a mere error which could be thus waived by the attorneys for the accused, but was an error which rendered the trial a nullity. Mr. Chief Justice Hughes said, at page 286:

> "That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore v. Dempsey, supra.*"

In *Mooney v. Hollohan*, 294 U. S. 103, this Court held that the requirements of due process could not be deemed to be satisfied

> "* * * by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

In a much older case, *Moore v. Dempsey*, 261 U. S. 86, the prisoners had been sentenced after a trial dominated by a mob. The trial court had jurisdiction of the offense and the accused, but the Supreme Court held that the mob domination of the trial deprived the prisoners of their liberty without due process of law and reversed the order of the lower court dismissing a petition for habeas corpus.

This Court, in the *Powell* case, did not, of course, fix any rule relating to representation by counsel beyond the extreme facts there present. Substantially all of the reasoning of that opinion applies, however, with equal force to any case in which an accused is placed on trial for the commission of a felony without the opportunity to be heard by counsel. This Court said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guilding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U. S. 45, 69.

The true test of whether the presence of counsel is essential to the substance of a hearing is whether the denial of the right violates those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert v. Louisiana*, 272 U. S. 312, quoted in the recent case of *Palko v. Connecticut*, ... U. S. ..., U. S. Supreme Court, October Term, 1937, No. 135.

The trial court, upon the hearing of the petition for habeas corpus, found that upon the facts here present there was such a violation of fundamental rights. In his opinion Judge Underwood said:

"I am of the opinion, therefore, that petitioners were deprived of their constitutional rights. * * *" 13 F. Supp. 253, 255.

If this conclusion of the trial court is wrong, it is difficult to determine what circumstances would bring a case within the rule of the *Powell* decision. Surely the fact that the crime may call for the death penalty is not a necessary circumstance, because the Fifth Amendment deals with liberty just as surely as it does with life. Certainly the element of disorder and mob spirit at the trial is not an essential, for so far as appears from the decisions in cases which have been similarly dealt with, the accused has been found to have been denied due process where there was no element of threatened violence at the trial. *Brown v. Mississippi,* supra; *Mooney v. Holohan,* supra. Complete illiteracy is not a test, for there is no contention that Mooney was illiterate or ignorant.

Petitioner contends that no matter what other circumstances may be present in the particular case, due process demands the appointment of counsel by the trial court wherever an accused is put on trial for the commission of a felony where he is otherwise unable to procure counsel and unless he gives his express and intelligent consent to proceed on his own behalf without representation. There is no dispute in this case but that petitioner here comes within such classification.

III.

PETITIONER'S CONVICTION IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS IS A NULLITY AND HE IS ENTITLED TO BE RELEASED UPON WRIT OF HABEAS CORPUS.

Assuming that petitioner has been deprived of his constitutional rights, the question still remains whether this abuse can be corrected by habeas corpus. The trial court was troubled by this question, and, in fact, discharged the writ on the assumption that the error was one which could be corrected only by appeal. The United States in its brief in opposition has greatly simplified our problem in this respect, by substantially conceding this point. On page 17 of its brief in opposition, the Government, with generous frankness, says,

> "If a violation of the Sixth Amendment because of failure to assign counsel were assumed, then, since the absence of counsel would affect the taking of steps for appeal within the prescribed time (Crim. Apps. Rule III), the rule of *Moore v. Dempsey* and Mooney v. Holohan might be applicable so as to admit of habeas corpus proceedings."

It is difficult to see how any other review could be taken of the matter. The District Court in its opinion pointed out that

> "the technicalities involved in the trial *and subsequent proceedings for new trial or appeal were such as to require the appointment of counsel as an essential element of the trial.*" 13 F. Supp. 253, 255. (Italics supplied.)

In spite of the recognition of this principle, the court held

that the error was one that could be corrected only by appeal. The decision of the trial court has the effect of saying that the Constitution protects a defendant against his ignorance of his right to have counsel assigned at his trial, but upon his conviction regards him not only as a sadder but a wiser man—wise enough, indeed, to know not only that he has already been deprived of his constitutional right to counsel, but also that he now has the right to have counsel appointed who will, by motion for new trial or appeal, secure for him a new trial at which he will have counsel. Plainly, the decision of the court below completely destroys the substance of the right to counsel.

The question presented is whether a judgment of conviction entered in a trial conducted in violation of the requirements of due process of law is such that it "is void and may be questioned collaterally." It is respectfully submitted that the precise question has been answered in the affirmative by the Supreme Court.

Where circumstances surrounding the trial take from it the essential elements necessary to constitute a hearing such as is demanded by due process, this Court has not hesitated to entertain a collateral attack. Thus in *Moore v. Dempsey*, 261 U. S. 86, where the pressure of a riotous mob turned the trial into a mere sham, and in *Mooney v. Holohan*, 294 U. S. 103, where the deception of court and jury by the intentional use of perjured testimony was held to make of the trial a mere pretense, this Court held that the accused could question the cause for his detention through habeas corpus proceedings. In neither of these cases did this Court decline to entertain the petition on the ground that by so doing the writ would be used as a substitute for a writ of error, although in both cases it is unquestioned that at the time of the original trial, the trial court had jurisdiction of the accused and of the sub-

ject matter. The trial court in both cases lost jurisdiction when the circumstances arose that turned the trial into a mere pretense. So it was when Johnson and Bridwell were placed on trial without counsel. The trial court no longer had jurisdiction to entertain a verdict or to pass judgment or sentence. Such actions were completely void. As was said in the case of *Hans Nielsen, Petitioner,* 131 U. S. 176,

> "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte Lange,* where the Court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of *Snow:* The Court had authority over the case, but we held that it had no authority to give judgment against the prisoner. *He was protected by a constitutional provision, securing to him a fundamental right. . It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment.*" (Italics supplied.)

Moreover, this Court has pointed out the similarity between the denial of due process through mob domination and such denial by failure to appoint counsel:

> "* * * a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm

> spirit of regulated justice, but to go forward with the haste of the mob'' (287 U. S., at p. 59).

The complete answer, however, to the contention made below but which the Government does not make here, to-wit, that even if petitioner has been deprived of his constitutional rights, he cannot obtain his freedom by habeas corpus, is that if he cannot obtain it in that manner, then he is absolutely helpless, for without counsel he cannot preserve the necessary record for appeal and he cannot prepare his appeal after trial under the appropriate rules of court. It seems clear that a right as vital as those guaranteed by the Fifth and Sixth Amendments cannot be so lightly brushed aside.

IV.

PETITIONER IS ENTITLED TO HAVE HIS TESTIMONY THAT COUNSEL WAS REQUESTED ACCEPTED AS TRUE.

As pointed out in divisions I and II of this argument, petitioner contends that even though all the disputed issues were resolved against him, he would nevertheless be entitled to relief because the particular circumstances about which there is dispute are not essential to show a denial of due process. However, petitioner recognizes that the exact circumstances of the trial are of importance, and, moreover, the Government in effect concedes his right to be released if the facts are as he alleges them to be. It is said on page 13 of the brief in opposition,

> ''If the petitioner's testimony were believed, we would assume that his conviction was in violation of the Sixth Amendment.''

It is then stated that neither the Government nor this Court is entitled to accept it as true, because it is contradicted by the District Attorney. It is of course unfortunate that the conflicting testimony was not resolved by the District Court. He found it unnecessary to do so because he found that petitioner had been deprived of his constitutional rights in any event. However, he did repeat the contention of petitioner in his written opinion and also commented on the District Attorney's denial. In view of the fact that the Government concedes that if petitioner's testimony is correct, he is entitled to his freedom, it seems important to comment briefly on the circumstances which seem to support his testimony. In the first place, both he and Bridwell testified that Bridwell asked the District Attorney if they could have a lawyer, and that the District Attorney replied that in the state of South Carolina counsel was not appointed except in capital cases. The very reasonableness of this reply in the light of the actions of the trial court bespeaks its truthfulness and sincerity. It is hardly likely that these men could have imagined any such reply by the District Attorney. It is also significant that when the testimony of the Assistant District Attorney was taken as to the happenings at the original trial, he was not asked as to his recollection on this point, and he did not testify whether or not he heard the question by Bridwell, although he did testify that he was present and participated in the entire trial. Moreover, the testimony of the Clerk before whose desk the colloquy took place tended to indicate the truth of Bridwell's testimony rather than the opposite. He stated, "I wouldn't say positively the judge refused counsel to the defendants" (R. 21).

Petitioner takes the position that since the Government concedes that he is entitled to the relief sought if the tes-

timony introduced on his behalf is true, then in any event, if the truth or falsity is deemed by this Court to be important, the decision of the Circuit Court of Appeals should be reversed and the case should be remanded to the trial court to resolve the question of fact.

CONCLUSION.

Petitioner shows that he was put on trial in a felony involving the gravest consequences without a lawyer to assist him in the preparation of his defense, to conduct the trial, or to assist him in the intricacies of an appeal, and that he did not expressly or intelligently waive the right to be so represented. He has shown that this right was denied him under circumstances that amount to a denial of due process of law, and having shown that, it seems that as a matter of common justice he is entitled to be released upon his writ of habeas corpus.

Respectfully submitted,

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